No. 86-1292

In The
Supreme Court of the United States
October Term, 1986

VINCENTE B. CHUIDIAN,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA,

Respondent,

PHILIPPINE EXPORT AND FOREIGN LOAN GUARANTEE CORPORATION, Real Party in Interest

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN R. REESE*
JAMES P. KLEINBERG
BETH H. PARKER
LESLIE G. LANDAU
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000

Attorneys for Respondent

*Counsel of Record

McCUTCHEN, DOYLE, BROWN & ENERSEN
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Should the Court review purported act of state issues where:

a. The lower courts in this case have not yet decided the issues;

b. The issues turn on factual determinations that have not and cannot be made because there is no factual record; and

c. The issues sought to be reviewed are settled.

2. Should the Court review the propriety of a state appellate court's request for advice from the State Department on act of state issues when there is no evidence that the State Department ever responded and the state court ultimately declined to consider those issues?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

No. 86-1292

In The
Supreme Court of the United States
October Term, 1986

VINCENTE B. CHUIDIAN,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, IN AND FOR THE COUNTY OF SANTA CLARA,

Respondent,

PHILIPPINE EXPORT AND FOREIGN LOAN GUARANTEE CORPORATION, Real Party in Interest

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Philippine Export and Foreign Loan Guarantee Corporation ("Philguarantee") moved to vacate a stipulated judgment entered by the California Superior Court for Santa Clara County on a settlement procured by fraud. The "opinion" (Pet. at 2) of which petitioner Vincente B. Chuidian seeks review is neither a decision on that motion, nor an adjudication of Chuidian's act of state defense; it is only an order setting a hearing on Philguarantee's motion to vacate. That hearing is currently scheduled for April 7, 1987.

Philguarantee is a Philippine corporation, wholly-owned by the Philippine government, which guarantees loans for economic development in the Philippines. In late 1980, Chuidian and one of his companies, Asian Reliability Co., Inc. ("ARCI"), applied for $25 million in loans, promising to use the loan proceeds for specific projects to develop the Philippine semiconductor industry. Based on that promise, Philguarantee guaranteed the loans. Chuidian did not use the money to develop the Philippine semiconductor industry. Instead, he purchased stock in several Silicon Valley firms. ARCI and Chuidian defaulted on the loans in 1984, and Philguarantee was forced to pay $25 million plus interest on its guarantee.

In May 1985, Philguarantee filed suit against Chuidian in California State Court to recover the $25 million it paid as guarantor on Chuidian's fraudulently procured and illegally diverted loans. Soon after the lawsuit was filed, however, then-President Ferdinand Marcos (through various emissaries) began conducting secret settlement negotiations with Chuidian. Chuidian threatened to reveal evidence damaging to Marcos and his family, and Marcos responded by pressuring Philguarantee to accede to Chuidian's settlement demands.

The settlement agreement gave Chuidian an enormous windfall. It required Philguarantee, the injured party, to (1) guarantee a payment to Chuidian of $5.3 million; (2) release its security interest in over two and a half million shares of stock in the Silicon Valley companies Chuidian had purchased; and (3) give up more than $25 million in claims against Chuidian and the companies he controlled. In "return," in a secret side agreement never filed with the state Court and signed only by Chuidian and Marcos's

personal representative, Chuidian promised to execute an affidavit denying the Marcos family's secret financial involvement in Chuidian's companies and to suppress evidence of it. At Chuidian's insistence, the settlement agreement (but not the secret side agreement) was presented to the California Superior Court, which entered a stipulated judgment on it.

After Marcos was deposed and forced to leave the Philippines in February 1986, Philguarantee moved to reopen the case on the ground that the settlement agreements and stipulated judgment had been procured through illegality, duress and fraud. Chuidian opposed any inquiry into the settlement, asserting among other things that the act of state doctrine barred examination of Marcos's motivation in coercing the agreements. On May 16, 1986, the court set a hearing date in June 1986 to address the motion.

It soon became clear that discovery delays—principally due to the procedural difficulties of issuing letters rogatory and securing deposition subpoenas for third party witnesses in the Philippines—would make a June hearing impossible. Accordingly, Philguarantee requested that the hearing be taken off calendar to allow the necessary discovery.

On June 17, 1986, the parties attended a hearing on Chuidian's motion for writ of execution against Philguarantee based on the stipulated judgment. Philguarantee opposed the writ in part on the ground that the underlying settlement agreements had been wrongfully procured, and sought postponement of execution so that full discovery on the issues could be taken. Chuidian opposed consideration of this evidence on the basis of the act of state doctrine.

The court granted Chuidian's motion for a writ of execution against Philguarantee. The court stated that be-

cause Philguarantee's motion to vacate the stipulated judgment had been taken off calendar, there was no basis for denying the writ. The court made no decision on the act of state issue, noting that "at this point there is nothing before the Court that will permit the Court to enter into that inquiry." (App. A.4) It then rescheduled the hearing on Philguarantee's motion to vacate.[1]

Chuidian did not give the Superior Court an opportunity to address the merits of his act of state defense. On August 6, 1986, he petitioned the State Court of Appeal for various writs and requested an immediate stay of proceedings in the Superior Court.[2] The Court of Appeal granted the stay before receiving Philguarantee's papers. (App. A-1, A-1.2) It then requested advice from the U.S. State Department on the effect that adjudication of this case would have on U.S. foreign policy. (App. B) The Court of Appeal, however, acted on the petition without ever receiving a response from the State Department;[3] after receiving

---

1 The hearing has been postponed several times to allow the time necessary for international discovery. The hearing currently is scheduled for April 7, 1987.

2 His writ petition was untimely under the California rule that writ petitions should be filed within the 60-day period that would govern the filing of a notice of appeal if the issue were appealable. *See Reynolds v. Superior Court*, 64 Cal. 372, 373 (1883); *People v. Superior Court (Kizer)*, 155 Cal. App. 3d 932 (1984).

3 Counsel for Philguarantee has checked the files of the Court of Appeal. The only communication from the U.S. government is a letter from William Kanter of the Department of Justice, who wrote that the Solicitor General's office would have to approve any statement and that no statement could be sent within the time period requested by the court. Mr. Kanter said he would let the court know if the U.S. government intended to send a letter. No further communication is in the Court's files.

Philguarantee's papers, the court, without opinion, denied the writ petitions and dissolved the stay. (App. A-2, A-3)

The California Supreme Court denied Chuidian's petition for review on November 12, 1986, also without opinion. Now Chuidian seeks review here.

SUMMARY OF ARGUMENT

1. Chuidian asks the Court to review whether the act of state doctrine bars all inquiry into the validity of the settlement agreement upon which the stipulated judgment in this case is based. The Court should refuse to grant review of this issue for two reasons:

a. The Court does not have jurisdiction to review this case now because there has been no "final judgment" (or indeed, any judgment) by the "highest court of [the] state in which a decision could be had" on the act of state issues. 28 U.S.C. § 1257. The "judgment" that Chuidian seeks to have reviewed is, at most, a decision by a trial court to set a hearing at which the act of state defense first will be addressed. That hearing has not yet taken place and neither the decision to set the hearing, nor the appellate courts' refusal to review that interlocutory decision by extraordinary writ, satisfies the jurisdictional requirements of 28 U.S.C. § 1257.

b. Because the California courts have not issued a decision on the act of state issues, there is no conflict between a state court of last resort and decisions of this or other federal courts. In fact, the legal issues he raises are largely settled. The act of state doctrine was created to

preclude interference by the judiciary into U.S. foreign affairs. It applies to bar adjudication only of public acts committed by a sovereign while acting on behalf of the government he is pledged to represent. Where, as here, the sovereign involved no longer is in power and the present administration has consented to adjudication by the U.S. courts, there is no reason to apply the doctrine. Moreover, it is premature to decide the act of state issues because there is no factual record by which a court could determine whether the acts involved are actually acts of state.

2. Chuidian asks the Court to review the propriety of the California Court of Appeal's request for a statement by the U.S. State Department on the effect that "inquiry into the circumstances surrounding the Chuidian-[Philguarantee] settlement and stipulated judgment may have on [the government's] foreign relations and ability to conduct its foreign policy." (App. B.1) The Court should not review this issue for two reasons:

a. There is no justiciable controversy here. The State Department never filed a statement with the Court of Appeal, and the court denied Chuidian's writ petition without ever addressing the merits of the purported act of state issues. Thus, there is nothing to review; Chuidian is simply asking for an advisory opinion on a matter of no consequence.

b. The Court of Appeal's request does not violate the policy concerns on which the act of state doctrine rests. The court merely sought the State Department's guidance on whether the acts in question would undermine U.S. foreign relations. Courts, including this one, often have requested and considered such opinions, recognizing that the

views of the Executive Branch, while relevant, are not dispositive. Thus, the procedure employed would not have impaired judicial independence—even if it had been carried out.

———o———

REASONS FOR DENYING THE WRIT

I. THERE IS NO JURISDICTION UNDER SECTION 1257 BECAUSE THE CALIFORNIA COURTS HAVE NOT YET RULED ON THE ISSUES SOUGHT TO BE REVIEWED.

Chuidian invokes the Court's jurisdiction under 28 U.S.C. § 1257(3). That section provides:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 1257(3). The "opinion" (Pet. at 2) Chuidian wants reviewed is not a "final judgment or decree." The Court therefore has no jurisdiction to consider this case, and Chuidian's Petition should be denied.

To determine whether there is a "final judgment" under Section 1257, "the test is . . . whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not

subject to further review by a state court." *Department of Banking v. Pink,* 317 U.S. 264, 268 (1942); *see also Market Street R.R. Co. v. Railroad Comm'n.,* 324 U.S. 548, 551 (1945) (state court judgment "must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of the final court"). The finality rule is designed to avoid the "mischief of economic waste and delayed justice," *North Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc.,* 414 U.S. 156, 159 (1973), that results from "piecemeal review." *Flynt v. Ohio,* 451 U.S. 619, 621 (1981). Moreover, "[t]his prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a state court." *North Dakota Pharmacy,* above, 414 U.S. at 159.

There has been no "final word of the final court" on Chuidian's act of state defense. *Market Street R.R. Comm'n* above, 324 U.S. at 551. Indeed, there has been *no* word of any kind from *any* court on that issue. The June 17 hearing that Chuidian cites as the source of the Superior Court's "opinion" (Pet. at 2) concerned Chuidian's request for a writ of execution. The court granted that writ because there was no basis for denying it. (App. A.5) The court expressly declined to rule on the merits of Philguarantee's motion to vacate or on Chuidian's act of state defense, for they were not before the Court.

> [A]t this point there is nothing before the Court that will permit the Court to enter into [the act of state] inquiry because [Philguarantee has] withdrawn [its] request for relief in connection with the motion to

> set aside the judgment based upon the fraudulent stipulation.

(App. A. 4) The court then set a date for a hearing on the motion and the act of state defense. (App. A.6-A.7)

An order scheduling a hearing to consider an issue is not a decision or judgment on that issue, final or otherwise, but that is all the court did and all there is for this Court to review. Nor do Chuidian's unsuccessful and premature writ petitions change the preliminary character of the lower court's action. If that were the law, the "final judgment" requirement would be written out of Section 1257.

Extraordinary writs are easily filed but rarely granted and the denial of such a writ may reflect only a concern for orderly appellate review rather than any position on the merits. Thus, under California law, review by extraordinary writ is available only when the issues have been decided below and cannot adequately be addressed on appeal at the end of the case. *See, e.g.*, Cal. Civ. Proc. Code §§ 1086, 1103 (writs of mandate and prohibition will only issue "where there is not a plain, speedy, and adequate remedy in the ordinary course of law"); *Randone v. Appellate Department*, 5 Cal. 3d 536, 543 (1971) (mandamus proper where interlocutory decision otherwise unreviewable); *Bank of America v. Superior Court*, 20 Cal. 2d 697, 703 (1942) ("certiorari will not lie if the effect of the order sought to be annulled can be reviewed and nullified on an appeal from the final judgment"). The more premature the petition or the more effective the appellate option, the less likely it is that a writ will issue. The state appellate courts here did not decide any issue on the

merits. They rendered simple orders declining review by extraordinary writ. Surely that does not convert an order that does nothing but set a hearing date into a "final judgment."

Chuidian seeks premature and piecemeal review. There has not yet been a ruling, nor even any hearing, on his act of state defense.[4] The Court therefore has no jurisdiction to review the case.

II. THE ACT OF STATE ISSUES THIS CASE PRESENTS ARE NOT UNRESOLVED QUESTIONS OF LAW.

On procedural grounds alone, this Court should deny review. Even if the Superior Court's dicta were construed as a ruling, however, this Court still should not review this case. The issues Chuidian raises are largely settled issues of law and turn on facts that have not yet been developed.

---

[4] This case is not within the narrow class of cases in which the finality requirement of Section 1257 may be satisfied before the termination of the action. Chuidian's act of state defense is central to the ongoing proceedings below; it is not a collateral federal question that has been finally adjudicated. *National Socialist Party v. Skokie*, 432 U.S. 43 (1977); *Construction Laborers v. Curry*, 371 U.S. 542, 549 (1963); *see also Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Chuidian will have a hearing on his defense and a right to appeal from any adverse decision, so denial of review now will not deprive him of a meaningful review later. *Curry*, 371 U.S. at 550. Nor will it effectively dispose of any protected right in the meantime. *Mills v. Alabama*, 384 U.S. 214, 217 (1966); *Abney v. United States*, 431 U.S. 651, 657 (1977). Finally, the scheduling of a hearing to address act of state issues does not threaten to undermine the federal policy embodied by that doctrine. *Flynt v. Ohio*, 451 U.S. 619 (1981); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). *See* § II.A, below. In sum, to grant review here would be to create an exception to the finality rule that would "swallow the rule." *Flynt v. Ohio*, 451 U.S. at 622.

Sup. Ct. Rule 17.1(c). Nor does the Superior Court's purported "opinion" (Pet. at 2) conflict with any federal law. Sup. Ct. Rule 17.1(b).

A. A COURT MAY REVIEW THE MOTIVATIONS OF A FOREIGN SOVEREIGN TO DETERMINE WHETHER THE ACT OF STATE DOCTRINE APPLIES.

Chuidian first claims that to determine whether the act of state doctrine applies here, a court must examine the motivations of a foreign sovereign and that this examination itself is precluded by the doctrine. (Pet. at 12) He then maintains that the California courts have ruled contrary to his version of the federal law. (*Id.*) Neither of these arguments is correct.

The California courts have not yet ruled on this issue at all, let alone ruled contrary to federal authority. (Pp. 7-10, above.) And the law is settled that the courts may scrutinize the motivations of the foreign sovereign to see if the challenged acts are actually acts of state. *Restatement (Revised) of Foreign Relations Law* § 469 at 59 (Tent. Draft No. 7, 1986). In *Banco National de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (*"Sabbatino"*), this Court held that the act of state doctrine "does not irrevocably remove from the judiciary the capacity to review the validity of foreign acts of state." *See also Timberlane Lumber Co. v. Bank of America, N.T. & S.A.* 549 F.2d 597, 606 (9th Cir. 1976), *citing Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962) ("the doctrine does not bestow a blank-check immunity upon all conduct blessed with some imprimatur of a foreign government").

Indeed, the law is clear that a court must examine the facts of the foreign sovereign's acts and motives to determine whether denial of the defense would thwart its underlying policy concerns. Thus, the party invoking the defense must prove that the challenged acts were in fact public acts and ratified by the foreign sovereign. *Republic of Philippines v. Marcos,* 806 F.2d 344, 359 (2d Cir. 1986). If the facts suggest they were not, the act of state doctrine does not apply. *Alfred Dunhill of London v. Republic of Cuba,* 425 U.S. 682, 694-95 (1976). Even if the acts are public, a court may decline to apply the doctrine if the foreign government involved is no longer in power or if the foreign state has come into the U.S. courts to seek adjudication of its controversies. *Republic of Philippines,* 806 F.2d at 359. In short, Chuidian's version of how a court may apply the doctrine is dead wrong.

B. THE ACT OF STATE DOCTRINE DOES NOT APPLY WHERE THE SOVEREIGN ACTS ULTRA VIRES.

Chuidian next urges this Court to grant certiorari to resolve the allegedly undecided question of "when, if at all, the private interest of third parties or personal interest of foreign government officials may render the actions of officials not official acts of state. . . ." (Pet. at 15) This is not an undecided question. To the contrary, it is well settled that where the sovereign acts *ultra vires* the act of state doctrine does not apply. Only when an official acts in an official capacity will judicial review be barred. *Filartiga v. Pena-Irala,* 630 F.2d 876, 889 (2d Cir. 1980) ("[W]e doubt whether action by a state official in violation of the Constitution and laws of the Republic of Paraguay, and wholly unratified by that nation's govern-

ment, could properly be characterized as an act of state"); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1380 & n.11 (5th Cir. 1980); *Jimenez, above,* 311 F.2d at 557-58 (doctrine rejected where chief of state, accused of embezzlement, fraud, and breach of trust, found to have committed crimes in violation of his position, not in pursuance of it); *Sharon v. Time, Inc.*, 599 F. Supp. 538, 544-45 (S.D.N.Y. 1984) ("The actions of an official acting outside the scope of his authority as an agent of the state are simply not acts of state. In no sense are such acts designed to give effect to a State's public interests"); *Dominicus Americana Bohio,* above, 473 F. Supp. at 690 ("[E]ven an unrepudiated act of state may be scrutinized by the courts if it resulted from the corruption of government officials").

The doctrine bars adjudication only of formal acts of the foreign government, such as legislative acts, regulatory decrees, or official pronouncements. *Dunhill,* above, 425 U.S. at 706; *Jimenez v. Aristeguieta,* 311 F.2d 547, 557-58 (5th Cir. 1962), *cert. denied sub nom.*, 373 U.S. 914 (1963); *Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F. Supp. 680, 689 (S.D.N.Y. 1979). In such instances, the official acts with the knowledge and approval of the state he or she is pledged to represent. Another relevant factor is whether the foreign government has ratified or tried to undo the challenged act. *See, e.g., Continental Ore,* above, 370 U.S. at 706-07 (doctrine inapplicable where corporation acted through agent of foreign government but without government's official approval); McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach*, 86 Yale L.J. 215, 236-37 (1976). Moreover, a private act does not become official

simply because the governmental actor covers his or her tracks with sham documentation. *See, e.g., United States v. The Watchmakers of Switzerland Information Center, Inc.*, 1963 Trade Cas. (CCH) ¶ 70,600 at 77,456-57 (S.D. N.Y. 1962, *order modified*, 1965 Trade Cas. (CCH) ¶ 71,352 (S.D.N.Y. 1965).

The Second Circuit recently reaffirmed these settled principles in a case virtually identical to this one, a case Chuidian conspicuously fails to cite. In *Republic of Philippines*, above, the Second Circuit upheld the district court's refusal to apply the doctrine to preclude judicial review of illegal acts Marcos committed while President of the Philippines. In so doing, it reiterated that for the doctrine to apply, the acts must be public acts of the sovereign. 806 F.2d at 358.

In sum, contrary to Chuidian's claim (Pet. at 15), the legal issues are resolved. Courts may examine the motivations of a sovereign official to determine whether the act of state doctrine should apply. Drawing the distinction between public and private acts may be difficult, but courts have repeatedly done it. *Dunhill*, above, 425 U.S. at 695 ("Distinguishing between the public and governmental acts of sovereign states of the one hand and their private and commercial acts on the other is not a novel approach"). And the guidelines for doing it are clear.

C. THE RECORD IS INADEQUATE TO DECIDE ANY ACT OF STATE ISSUE.

There is no undecided issue of law here. But even if there were, this is not the right case to review it. To determine whether the act of state doctrine applies, a court must decide whether the acts at issue are in fact acts of

state. This requires a developed factual record, which does not exist here. At the time of the Superior Court's alleged "opinion" (Pet. at 2), no discovery had yet taken place. Indeed, Philguarantee had taken its motion to vacate off calendar because there was not enough time to develop the record before the hearing. Absent a complete factual record, it is impossible to determine whether the fraudulently obtained settlement agreement which Philguarantee seeks to vacate was a public act of the predecessor Philippine regime or effected by Marcos for his personal gain. Because the Court cannot decide Chuidian's motivation issue in a vacuum, it should decline review. *See New York Land Co. v. Republic of Philippines*, 634 F. Supp. 279, 289 (S.D.N.Y.), *aff'd sub nom.*, 806 F.2d 344 (1986) (recognizing that development of further factual evidence was necessary before it could decide whether the act of state doctrine applied).

D. THE ACT OF STATE DOCTRINE APPLIES ONLY WHERE ADJUDICATION WILL HINDER U.S. FOREIGN RELATIONS.

Chuidian conjures up a parade of horribles to persuade the Court to review this case. He claims that the Superior Court's setting of a hearing will lead to wholesale repudiations by foreign nations of their commercial obligations. (Pet. at 26) And he asks for a ruling "that the act of state doctrine prevents repudiation of foreign debt on political grounds by successor regimes." (Pet. at 29) Chuidian misses the point. Under this Court's rulings, the act of state doctrine only applies when adjudication will hinder U.S. foreign relations or will cause disrespect for foreign states. Chuidian's convoluted analysis misconstrues

this policy, ignores well-established case law, and exaggerates the importance of this case.

The act of state doctrine was created to avoid judicial interference with U.S. foreign affairs. *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 765-66 (1972); *Sabbatino*, above, 376 U.S. at 425. It also was intended to avoid disrespect for foreign governments with the attendant risks of imperiling amicable relations and vexing the peace of nations. *Sabbatino*, above, at 431-32; *Oetjen v. Central Leather Co.*, 246 U.S. 297, 394 (1918). In accordance with this policy, to determine whether the doctrine applies, a court must consider the impact of the adjudication on foreign affairs.

> Act of state analysis depends upon a careful case-by-case analysis of the extent to which the separation of powers concerns on which the doctrine is based are implicated by the action before the court.

Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 316 n.38 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982). Where the issue is unlikely to affect our foreign relations, the justification for applying the doctrine is considerably weakened. *Sabbatino*, above, 376 U.S. at 428.

Consistent with these principles, the lower courts have articulated factors that mitigate the need for act of state treatment of even some official acts. There is no dispute about the validity of this analysis, and thus no need for this Court's review.

1. There Can Be No Effect on U.S. Foreign Policy Because Marcos Is No Longer President.

In *Sabbatino*, this Court stated that "in its traditional formulation" the act of state doctrine "precludes the courts of the United States from inquiring into the validity of the public acts a *recognized* foreign sovereign committed within its own territory." 376 U.S. at 401 (emphasis added). The Court further indicated that a change of regime may make the act of state doctrine inapplicable:

> The balance of relevant considerations may . . . be shifted if the government which perpetrated the challenged act of state is no longer in existence . . . for the political interest of this country may, as a result, be measurably altered.

Id. at 428.

There has been such a change of government in this case. Marcos is no longer the President of the Philippines. and the U.S. no longer has diplomatic relations with him. Moreover, no act of the current Philippine government is at issue. In fact, the present government *supports* the position of Philguarantee challenging the former President. Thus, the political interest of the United States has been "measurably altered," *Sabbatino*, 376 U.S. at 428, and inquiry into Marcos's actions will not affect U.S. relations with the Philippines. The Second Circuit came to this very conclusion only months ago. *See Republic of Philippines*, above, 806 F.2d at 359 ("[T]he danger of interference with the Executive's conduct of foreign policy is surely much less than the typical case where the act of state is that of the current foreign government.")

Chuidian ignores this case and the settled principles on which it is based. He relies instead on two dated Second Circuit opinions, *Banco de Espana v. Federal Reserve*

Bank, 114 F.2d 438 (2d Cir. 1940) and *Bernstein v. Van Heyghen Freres Societe Anonyme,* 163 F.2d 246, 249 (2d Cir.), *cert. denied,* 332 U.S. 772 (1947), which that Circuit in considering this issue expressly disapproved. *Republic of Philippines,* above, 806 F.2d at 359. Thus, the law is settled that where, as here, the sovereign whose acts are challenged no longer presides, the act of state doctrine should not apply. There is therefore no issue that warrants this Court's attention.

2. There Is No Reason to Invoke the Doctrine Where, As Here, the Foreign Entity Submits to Adjudication by a U.S. Court.

There is also no reason to apply the act of state doctrine where, as here, the foreign state asks the U.S. courts to scrutinize its actions. Where the government consents to the adjudication, the doctrine should not apply. *See, e.g., Republic of Philippines,* above, 806 F.2d at 359; McManis, 86 Yale L.J. at 235 ("Of course, if the foreign government itself brings the action, the act of state doctrine is an untenable defense, for the government in effect is calling for judicial inquiry").

Here, both Philguarantee and the present Philippine government sought adjudication of their disputes with Chuidian. In so doing, they acknowledged that their actions would be subject to external examination. Philguarantee filed its complaint against Chuidian in May 1985 seeking damages for Chuidian's wrongful conversion of $25 million in loans, and in 1986 filed its motion to vacate the settlement agreements. The Presidential Commission on Good Government, the arm of the current Philippine administration charged with investigating Marcos's corruption, also

has approved judicial review. It requested the Superior Court to extend the time before hearing so that the results of its own investigations into the settlement could be incorporated into the evidence before the court.

Chuidian has cited no controlling contrary authority. In neither *DeRoburt v. Gannett Co.*, 733 F.2d 701 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985), nor *Banco de Espana v. Federal Reserve Bank*, 114 F.2d 438 (2d Cir. 1940), did the existing government initiate the action. Thus, even if the trial court's passing reference to the act of state doctrine is treated as a ruling, it is not contrary to any federal law. Moreover, Chuidian's truncated citation of the Restatement (Pet. at 19) seriously misleads the Court. In a portion omitted by Chuidian, the Restatement says:

> *When a state has expressly subjected certain kinds of obligations to adjudication in the courts* or arbitral tribunals *of another state*, it may be said to have acknowledged that its actions with respect to those obligations take place in the international arena and are subject to international scrutiny, and in such cases *the justification for applying the act of state doctrine is significantly weaker.*

Restatement (Revised) of Foreign Relations Law § 469 at 56 (Tent. Draft No. 7, 1986) (emphasis added). There is no need for this Court to articulate a different rationale.

3. Refusal to Apply the Doctrine Here Will Not Undermine Twenty Years of Philippine Obligations.

Finally, Chuidian argues that "[t]he public policy interest in the security of international debt, requires articulation in act of state analysis by this Court." (Pet. at 27)

He attempts to aggrandize this case, claiming that if the act of state doctrine is found not to apply, it will invite "wholesale repudiation of foreign debt undertaken by the Marcos government." (Pet. at 24) He even implies that unless the Court intervenes in the Superior Court's decision to set a hearing, other governments owing substantial sums to U.S. interests will ignore their financial obligations. (Pet. at 26)

These contentions are ludicrous. There is no threat to undercut every "debt obligation undertaken by the Marcos government during the more than twenty years of Marcos rule." (Pet. at 25) The present Philippine government has not repudiated any commercial debt here. Rather, this case involves Marcos's relations with one individual, which resulted in a secret, illegal, and fraudulently induced settlement agreement. Thus, there is no reason to believe resolution of this action will affect any commercial obligations between the former Marcos government and U.S. entities. Even if it did, a plurality of this Court already has indicated that the act of state doctrine does *not* apply to commercial debts. *Dunhill*, above, 425 U.S. at 695, 705.[5]

---

[5] Nor does this case call for an extension of the act of state doctrine to preclude review of a successor government's efforts to void a financial obligation of a prior administration. (Pet. at 29) Courts can invalidate such actions under the rule of state succession, a substantive principle of international law. That rule should not be extended to bar adjudication at the outset of the issues presented here. Courts should continue to decide these issues by applying the substantive rule, if appropriate, rather than abstaining from reviewing the question altogether under an expanded interpretation of acts of state.

III. THIS COURT SHOULD NOT RENDER AN ADVISORY OPINION ON THE COURT OF APPEAL'S REQUEST FOR THE VIEWS OF THE STATE DEPARTMENT.

A. THE COURT OF APPEAL'S ACTION DOES NOT PRESENT A JUSTICIABLE CONTROVERSY.

Chuidian says that the Court of Appeal acted improperly in requesting the views of the State Department on the effect that adjudication of this case would have on U.S. foreign relations. The court's action was proper. But even if it weren't, nothing ever came of the court's request. Thus, in this Court's words, "One naturally asks, 'So what?' " *Public Service Comm'n v. Wykoff*, 344 U.S. 237, 244 (1952). Despite Chuidian's suggestions to the contrary (Pet. at 30), the Court of Appeal acted before receiving a response from the State Department, and as far as we know, no response ever came. A non-existent response could not have influenced the Court's decision to deny Chuidian's request for extraordinary relief. In short, there is nothing to review.[6]

Because there is no evidence that there ever was a State Department response, Chuidian cannot claim that "the challenged action [here, the Court of Appeal's request for a State Department letter] has caused him injury in fact." *Association of Data Processing Service Orgs.*,

---

[6] Chuidian challenges "the procedure employed by the California Court of Appeals," which he says was "validated by the order of the California Supreme Court." (Pet. at 31) This misstates the facts. The so-called "procedure" consisted of a request for advice that never came. Far from "validating" the nonexistent "procedure," the Supreme Court simply denied review without comment.

Inc. v. Camp, 397 U.S. 150, 152 (1970). Nor can he say that a favorable decision on this issue will provide him with any meaningful redress. He therefore has no standing to challenge the Court of Appeal's action and review should be denied. *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982) ("at an irreducible minimum, Article III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action,' and 'is likely to be redressed by a favorable decision' ") (citations omitted).

More fundamentally, there is no action to challenge and therefore no "case or controversy." U.S. Const., Art. III.

> A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. . . . It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts.

Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted); *see also North Carolina v. Rice,* 404 U.S. 244, 246 (1971). Chuidian wants an opinion on whether a Court may ask for the views of the federal government, and the "weight" and "proper procedure to be accorded expressions of opinion by the Executive" (Pet. at 34) once they are received. Where there was no State Department letter, let alone a decision based on it, the

issue is not ripe for adjudication, and the Court will not give an advisory opinion. Even if the Court of Appeal's request for the letter initially presented a justiciable controversy, its denial of the writ without opinion before receiving a response made the issue moot. *See Iron Arrow Honor Society v. Heckler,* 464 U.S. 67 (1983); *Kremens v. Bartley,* 431 U.S. 119 (1977).

There never was a justiciable issue here. If there ever were, it is now moot. There is nothing to review, and Chuidian's petition should be denied.

B. THE REQUEST ITSELF DOES NOT VIOLATE THE ACT OF STATE DOCTRINE.

According to Chuidian, a court may never request the views of the Executive Branch in reaching a decision that concerns Executive Branch prerogatives. (Pet. at 30-35) If Chuidian were correct, no court could ever seek briefs of amici curiae to clarify act of state (or any other) issues. Chuidian's proposal is absurd on its face.

This Court has approved consideration of the Executive Branch's views in resolving act of state issues. *See, e.g., First National City Bank v. Banco Nacional de Cuba,* 406 U.S. 659, 768 (1972) ("We conclude that where the Executive Branch, charged as it is with primary responsibility for the conduct of foreign affairs, expressly represents to the Court that application of the act of state doctrine would not advance the interests of American foreign policy, that doctrine should not be applied by the courts"). The lower courts have followed suit. In *Republic of Philippines,* 806 F.2d at 356-57, 360, for instance, the Second Circuit took into account the State Department's opinion that it would not fear embarrassment if the

U.S. courts adjudicated disputes between the Philippine government and ex-President Marcos before scrutinizing the acts in question. *See also Allied Bank International v. Banco Credito Agricola de Cartago,* 757 F.2d 516 (2d Cir. 1985); *Occidental of UMM al Qaywayn, Inc. v. A Certain Cargo of Petroleum,* 577 F.2d 1196, 1204 & n.14 (5th Cir. 1978), *cert. denied,* 442 U.S. 928 (1979) ("it is nonetheless clear that whether the state department believes that judicial action would interfere with its foreign relations is germane to whether a court may decide actions involving foreign relations").

Considering the views of the Executive Branch does no violence to the separation of powers policy on which the act of state doctrine rests. The opinion of the Executive Branch is relevant to act of state issues, though not dispositive. *First National City Bank,* above, 406 U.S. at 773 & n.4 (Douglas J., concurring in result); *id.* at 775-76 (Powell, J., concurring in judgment); *see also Republic of Philippines,* above, 806 F.2d at 358; *Banco Nacional de Cuba v. Chase Manhattan Bank,* 658 F.2d 875, 884 (2d Cir. 1981). As the American Law Institute stated in the *Restatement (Revised) of Foreign Relations Law:*

> It seems that if the State Department issues a letter requesting that the courts not review the validity of a particular act, such a letter will be highly persuasive if not binding . . . . If the State Department issues a letter stating that it has no objection on foreign relations grounds to adjudication of the validity of a given act of a foreign state, U.S. courts will make their own determination as to whether to apply the act of state doctrine, taking the view of the Executive Branch into account but not being bound by it.

§ 469 at 69. Thus, there is no threat that a request for advice will hinder judicial independence in deciding these issues.[7]

In requesting the views of the State Department, the California Court of Appeal did not agree to be bound by the Executive Branch's position. It merely sought the U.S. government's views "[t]o aid its determination" on issues which potentially could implicate U.S. foreign affairs. (App. B-1) As it turned out, the court declined review, so any advice was moot. Even if the advice were relevant, however, the court's action is no different from requesting briefs of amici curiae, a practice recognized and used by this Court. *See, e.g., Iran v. Boeing,* — U.S. —, 106 S. Ct. 2243 (1986) ("The Solicitor General is invited to file a brief in this case expressing the views of the United States"); *Bob Jones University v. United States,* 456 U.S. 922 (1982). In no way does the request for advice require "an abandonment of judicial independence." (Pet. at 33) The court simply seeks guidance from the Executive on the potential threat to foreign relations the case may present.

---

[7] Nor, as Chuidian maintains (Pet. at 31), does this Court's decision in *Sabbatino* suggest a different result. There, the Court rejected the suggestion of amici curiae that when the Executive Branch expressly stipulates that it does not wish a court to adjudicate the issues presented, its views should be dispositive. 376 U.S. at 436. It recognized, however, that the opinion of the Executive may be a relevant factor to a court's determination.

———————o———————

CONCLUSION

Chuidian wants to bypass the entire state court system and try his act of state defense in this Court in the first instance. This Court does not sit to try cases. Nor does it sit to give advisory opinions. Here there is no developed factual record, nor are there any reasoned decisions by the California courts below. The Court should deny Chuidian's Petition.

Respectfully submitted,

JOHN R. REESE*
JAMES P. KLEINBERG
BETH H. PARKER
LESLIE G. LANDAU
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000

Attorneys for Respondent

*Counsel of Record

McCUTCHEN, DOYLE, BROWN & ENERSEN
Of Counsel

March 13, 1987